*Held*, 6th, That the warrant was not bad as to duration or nature of imprisonment.

*Held*. 7th, That the amount of costs was sufficiently fixed on the warrant of commitment.

*Held*. 8th, That there is power to commit for non-payment of costs.

*Held*. 9th, That the statute does not require both imprisonment and money penalty to be awarded, but that there may be both or either.

[Chambers, May 13, 1865.]

This was an application for the discharge of the prisoner from close custody, under writ of *habeas corpus*.

The prisoner, as appeared by return to the writ, was confined in Chatham gaol, on two charges under the Foreign Enlistment Act.

Prior to the receipt of the writ, the gaoler had received two additional warrants by the committing magistrate, the first two being open to grave objections. All the warrants were returned.

The convictions were had before Mr. McCrae, police magistrate for the town of Chatham, under the late Canadian act 28 Vic. cap. 2.

Each warrant averred that on a day named, "at the town of Chatham, in the said county, he the said Andrew Smith did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided," &c.; and then proceeded: "And whereas the said Andrew Smith was duly convicted of the said offence before me the said police magistrate, and condemned," &c.

*James Paterson* for the crown.
*J. B. Read* for the prisoner.

HAGARTY, J.—Mr. Read objects, first, that it was not shown that the police magistrate was acting within his jurisdiction. The warrant shows that the charge was made at the town of Chatham before Mr. McCrae, police magistrate for said town, and that the attempt to enlist was made at Chatham; and it professes to be given under the magistrate's hand and seal at Chatham. It cannot possibly intend that the magistrate acted in any way except in his jurisdiction, in the presence of these objections.

Secondly, that the directions to take prisoner "to the common gaol at Chatham" is insufficient.

The warrant is addressed "To the constables, &c., in the county of Kent, and to the keeper of the common gaol at Chatham, in the said county," and I think a direction to the said constables to convey him "to the common gaol at Chatham aforesaid," is quite sufficient.

Thirdly, that the conviction is only recited, and the warrant does not contain a direct adjudication in itself.

I think the warrant sufficiently clear from objection on that ground. The conviction itself, if produced, would be worded differently, and would express directly and not by way of recital the adjudication of the magistrate: (See *In re Allison*, 18 Jur. 1055.)

Fourthly, That "enlist to serve," shows a double offence, when "enlisting," or "serving" is sufficient.

I see nothing in this objection.

Fifthly, That the offence is not sufficiently described.

The statute declares that "if any person, &c., shall hire, &c., or attempt, &c., to hire, &c., any person or persons, &c., to enlist or to enter or engage to enlist, or to serve or to be employed in any warlike or military operations in the service of, &c., any foreign prince, state, &c., either as an officer, soldier, sailor or marine, or in any other military or warlike capacity." The words in the warrant are, "to enlist to serve *as a soldier* in the army of the United States of America, contrary to the statute," &c., omitting the words "in any warlike or military operation." On the best opinion I can form on this point, I think the warrant is good against this objection. I think the words "to enlist to serve as a soldier in the army of the United States of America," comes within the act. The word "army" does not occur in the act, but it seems to me that it is impossible to serve as a soldier in the army without serving as a soldier in some warlike or military operation. It is made an offence to serve as a soldier in any warlike or military operation, or in any other military or warlike capacity. I think to serve as a soldier in the army comes within the words of the statute. Mr. Read urged that the statute pointed to serving in actual hostile operations. I do not think it is so limited, but that it covers attempts to procure soldiers here for the army of a foreign state, at peace as well as at war. I think serving as a soldier in the army must come under either alternative, as a warlike or a military operation.

Sixthly, That the commitment for the further time beyond the six months, is not to be at hard labour, as the six months are declared to be.

I think the act does not require this. After speaking of six months at hard labour, it continues, "and if such penalty and costs be not forthwith paid, then for such further time as the same may remain unpaid," without adding "at hard labour" for such further time.

Seventhly, That adjudication is in addition to the $4 50 for costs; for all costs and charges of commitment, and conveying him the said Andrew Smith to the said common gaol, amounting to the further sum of $1.

This, I think, sufficiently fixes the amount in a warrant of commitment. As to the power to commit for such costs, the statute creating the offence merely says "may be condemned to pay a penalty of $200 with costs." I find provisions in our law for ordering payment in summary convictions, as in section 62, chapter 203, Consolidated Statutes of Canada, where, after ineffectual attempt to levy penalty and costs by distress, the committing justice may direct imprisonment, unless the sum adjudged be paid, and all costs of distress, "and also the costs and charges of the commitment, and conveying the defendant to prison, if such justice think fit so to order, the amount thereof being ascertained and stated in such commitment." I cannot therefore say that under a statute inflicting a penalty "with costs," the costs of conveying defendant to prison may not lawfully be added. In one of the cases there is no imprisonment awarded, only the penalty and costs, and imprisonment if they be not paid. Mr. Read urges that the statute requires both the imprisonment and money penalty to be awarded, and "that may be condemned to pay," and "may be committed to gaol," mean "must be condemned" and "must be committed." As I read the statute I think it was intended to allow both fine and imprisonment, or either, and that it was not compulsory to award both. I think it a harsh